United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

NO. 74-1868

In the

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

No. 74-1868

KATRINA McEACHERN,
Plaintiff-Appellant

v.

ANDREW CONSIGLIO, et al,
Defendants-Appellees

On Appeal from the United States District Court
for the District of Connecticut

BRIEF OF DEFENDANTS-APPELLEES

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KATRINA McEACHERN,

Plaintiff-Appellant,

V. No. 74-1868

ANDREW CONSIGLIO, individually and in his capacity as an Officer in the New Haven Police Department, and CURTIS WILLOUGHBY, individually and in his capacity as an Officer in the New Haven Police Department,

Defendants-Appellees.

BRIEF ON BEHALF OF DEFENDANTS-APPELLEES

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QUESTION PRESENTED

Should this court reverse its prior holding in Bivens v. Six Unknown Agents, 452 F. 2d. 339 (1972) that it is a defense to Title 49, Section 1983 actions for defendant officers to allege and prove good faith and reasonable belief in the validity of an arrest and search and in the necessity for carrying out the arrest and search in the say the arrest was made and the search conducted.

STATEMENT OF FACTS

Plaintiff-appellant and her family of five resided on the first floor flat at 671 Winchester Avenue on the southeast corner of Winchester Avenue and Highland Street. Plaintiff-appellant testified that she and her husband were sleeping in a room in the front of the flat, their oldest son was sleeping in a room adjacent to the kitchen in the back of the house, another daughter slept near the front of the house and Gwendolyn slept in a room in the middle of the house that did not open on the kitchen.

The plaintiff-appellant testified that she was asleep in the front portion of her flat and never heard any noise whatsoever and neither she nor her husband knew that police had entered her flat until some time the next morning when her daughter told her; the son, whose bedroom was in the room adjacent to the kitchen and the closest to the back door, also testified that he did not hear the police, nor did he know they had entered the kitchen. The eldest child of the plaintiff, Gwendolyn McEachern, testified that she had been talking on the telephone from 11:00 p.m. on the night of July 6, 1971 until somewhere around 4:00 a.m. on July 7, 1971, and she testified that it was either at the same time she hung up the telephone or immediately thereafter or immediately before that she realized that two policemen were in the house. She denied speaking to them and testified that she could see them walk through the kitchen, into her mother's bedroom, and searching the premises; however, it was proven with mathematical certainty that from the point where

she testified her head was in the bedroom, with a door that was only open one-half of an inch, she could not possibly have seen what she testified she saw. She also testified that when the police left the house, she crawled out into the kitchen, checked the door, and while crawling back to the bedroom was able to see out the window and noticed several squad cars parked outside the door. She placed three officers in the house and described events that she could not have seen. Her version was a fabrication of the events which transpired, and she was disbelieved by the jury.

On the contrary, the two officers testified that a known and reliable informant (the identity of which was offered by the defendant to Judge Jon O. Newman, en camera) who had furnished information which has led to eleven arrests and convictions, which was testified to by Officer Consiglio and he advised the officers at a point about two blocks away from the McEachern home that the Jones brothers had just received a shipment of heroin and were at their apartment. He told the officers the Jones brothers were about to leave the premises to have the same cut for distribution on the street. The informant entered the police car and pointed out the house where he said the Joneses lived. The officers backed to a safe place to let the informant leave the vehicle and immediately proceeded to the rear of the designated house where they went up the back steps, rapped on the door, and announced that they were policemen; they heard scuffling, and turned the handle of the door, lightly pushing the same, as a result of which the bolt lock which was ajar bent

a little more allowing them in. They turned on a light and heard a voice say, "Who's there" and announced themselves as policemen and that they wanted the Jonses. The voice said "This is not the Joneses house, they live across the street." The policemen said they were sorry for disturbing them, closed the door, went over to the house across the street, and located the narcotics, just as the informant said they would be.

There was no divergence of any of the testimony of the McEacherns and police officers until Gwendolyn McEachern, the last witness produced by the plaintiff, told a story which was completely contrary to the physical facts as demonstrated by her testimony, and she was obviously disbelieved.

Therefore, the only question involved concerns the factual situation wherein two police officers received information from a known and reliable informant whose eleven prior tips had resulted in eleven arrests and eleven convictions, that the Jones brothers were in possession of a large quantity of heroin, and that informant pointed out the house at 671 Winchester Avenue, as being the home of the Jones brothers, when in fact the house where the Joneses live is across the street at 657 Winchester Avenue (the next house in line). The officers walked up the back steps, knocked on the door, announced they were police, heard scuffling, and merely turned the door knob and with the slightest pressure moved an already broken latch, entered the kitchen, turned on the light and re-announced themselves as police officers, asked if the Joneses were present, and when told they are in the next house, apologized and left.

Must the occupant of the wrong premises, as a matter of law, be compensated under Title 42, Section 1984?

ARGUMENT

I. THE RULE OF THIS COURT IN BIVENS V. SIX UNKNOWN AGENTS 456 F. 2d. 1339 (1972) IS A CORRECT STATEMENT OF THE LAW WITH REGARD TO THE DEFENSE OF GOOD FAITH AND PROBABLE CAUSE TO AN ACTION UNDER TITLE 42 UNITED STATES CODE SECTION 1983, AND THAT RULE IS CONSISTENT WITH OTHER FEDERAL COURT DECISIONS.

On Pages 35 and 36 of her brief, plaintiff-appellant admits that the lower court correctly charged "good faith and probable cause" consistent with this Honorable Court's decision in Bivens, supra. By claiming that other courts have not followed this reasoning, plaintiff-appellant has asked this Honorable Court to reverse itself.

At Page 1347 of Bivens, supra, and restated in the concurring opinion at Page 1348, the holding is:

> "At common law the police officer always had available to him the defense of good faith and probable cause and this has been consistently read as meaning good faith and 'reasonable belief' in the validity of the search or arrest..."

This language was used by the lower court in the instant case when it said the standard governing police conduct is composed of two elements, the first is subjective and the second is objective.

On reviewing the many citations of the plaintiff-appellant which claim the defense that the officers must plead and prove is that their search must be accomplished with probable cause when viewed in the Constitutional sense, one must conclude not one of the cases cited stands for that proposition.

The defendants-appellees fully agree that the words "probable cause" are present in Giordano v. Lee, 434 F. 2d.

1227 (1970); Beauregard v. Wingard, 362 F. 2d. 901 (1966); Strutt v. Upham, 440 F. 2d. 1237; William v. Gould, 486 F. 2d. 547 (1973 Ninth Cir.); Joseph v. Rowland, 402 F. 2d. 367 (1968 Seventh Cir.); Notaris v. Ramon, 383 F. 2d. 403 (Ninth Cir. 1967). However, not one of them makes the statement that probable cause is to be in the "Constitutional sense." This Court in Bivens, supra, states "The defense of good faith and probable cause... and this has been consistently read as meaning good faith and 'reasonable belief' in the validity of search and arrest..." and not one of the cases cited by the plaintiff-appellant in any way changes or distinguishes this situation.

The plaintiff-appellant's claim that by implication, that is what is referred to. That is not what the cases say, however.

It is claimed by the defendants-appellees that, in any event, without using the words "probable cause" the trial court in the instant case in fact and in law charged probable cause, and, therefore, the claim of the plaintiff-appellant is without merit. As a matter of fact, the situation as it existed in the instant case certainly would satisfy the test of probable cause in the Constitutional sense.

In Giordano, supra, the question of good faith and probable cause was submitted to the jury for its determination. However, the fair reading of "probable cause" is that it means what is meant in Bivens, supra, i.e. reasonable belief. There is no contrary definition in Giordano, supra.

Beauregard, supra, states at 903, that there was probable cause for the arrest. That was found; however, that is not the

same thing as to say one must not have had a reasonable belief that Beauregard had engaged in bookmaking, but rather that he had probable cause to believe he was engaged in bookmaking. It does say, in the special verdict number 1, that Wingard did not have reasonable grounds upon which to base a suspicion that Beauregard was engaged in bookmaking.

Strutt, supra, adds nothing at all to plaintiff-appellant's claim; in fact it says "reasonable or probable cause - obviously a negligence standard.

William, supra, involves a case identical to the case at Bar. In William, supra, an officer broke into a plaintiff's apartment on the ground he had believed in good faith and had a reasonable belief that a felon was inside. The lower court held good faith was not a defense; the case was reversed on the ground that good faith and reasonable belief are a sufficient defense and further, the case does not require an answer to the defense that a warrant was not necessary to enter the apartment to arrest a felon. This case contradicts plaintiff-appellant's argument.

Joseph v. Rowland, 402 F. 2d. 367, 370 (1968) cited by the plaintiff-appellant as her primary case for the holding that the law ought to be that the officers, in defending against a Section 1983 action, prove they had probable cause under Constitutional standards in order to establish their defense. (Plaintiff-appellant's Brief P. 5, and Comments of the Court A. 22) That case does not so hold. At Page 370, the Court held,

> "Although the Supreme Court refers in Pierson to 'the defense of good faith and probable cause', available to a police officer under sec. 1983, there is no suggestion that a police officer is entitled to a defense of good faith when he makes an arrest without a warrant and without probable cause."

However, in this case, the only holding is that,

> "...where a police officer makes an arrest which is unlawful under the federal constitution because made without a warrant and without probable cause to believe that the person arrested had committed or was committing an offense, sec. 1983 imposes on the officer a liability which is recoverable in federal court. Additional circumstances coloring the officer's action as flagrant or malevolent are not required."

These quotations must be read in the light of the facts of Joseph, supra, where the officer admitted he did not think Joseph had committed a crime. Therefore, there is no defense to his action under any theory. Moreover, the last quoted section of Joseph, supra, only applies to the first prong of Bivens, supra, not the second prong - an unlawful or unreasonable search or arrest. The first quoted section merely states good faith must be accompanied by the objective test of probable cause which, as hereinbefore pointed out, means reasonable belief.

Anderson v. Haas, 341 F. 2d. 497, 501, 502 (Third Cir. 1965) does not support the court's rationale in Joseph, supra, by reason of the fact that Anderson, supra, specifically holds that the good faith without just cause or provocation (the opposite of reasonable belief) would subject the officer to the loss of a defense; e.g. Joseph, supra, holds that good faith and reasonable belief is synonomous to good faith and probable cause.

II. THE EFFECT OF THE CHARGE OF THE COURT BELOW DID NOT REMOVE THE ISSUE OF PROBABLE CAUSE FROM THE CASE ALTOGETHER, IN VIOLATION OF THE PLAINTIFF-APPELLANT'S CONSTITUTIONAL RIGHTS, AND IN FACT, THE EFFECT OF THE COURT'S CHARGE WHEN APPLIED TO THE DEFENDANT-APPELLEE'S ACTIONS, SATISFIES THE TEST OF PROBABLE CAUSE EVEN WHEN VIEWED IN THE CONSTITUTIONAL SENSE.

If this Court will read the defendant-appellee's evidence as set forth by the plaintiff-appellant on Pages 4 and 5 of plaintiff-appellant's brief and immediately read the portion of the court's charge dealing with this aspect of the case on Appendix Page 50, last paragraph, through the first paragraph on Page 53, the court will have to conclude that the jury was more than adequately instructed on the standards to be applied to the actions of the officers. The cases cited by the plaintiff-appellant have been more than satisfied by this charge. As a matter of fact, even the circumstances of "hot pursuit" was present in the case as the officers testified, and the plaintiff-appellant admits, that the reason for entering the apartment was that of the arrest of the Jones brothers to prevent their leaving the apartment in order to cut the heroin for distribution on the street. This claim of error is without merit.

III. THE GENERAL VERDICT PRECLUDES PLAINTIFF-APPELLANT'S RAISING THE CLAIMS IN PART I OF HER BRIEF.

The plaintiff-appellant did not draw to this Honorable Court's attention that the jury returned a general verdict in favor of both defendants-appellees against the plaintiff-appellant. This means that in the absence of interrogatories the jury may well have, and this court should conclude that it did, find that the search of the plaintiff-appellant's home was a reasonable search and that the plaintiff-appellant's Constitutional rights had not been violated, and therefore, it was not necessary for the jury to go any further than to find that the search was reasonable, and therefore, the plaintiff-appellant's Constitutional rights had not been violated. There were no interrogatories submitted to the jury to find out whether or not the jury found that the search of the plaintiff-appellant's home was unreasonable and that perhaps the jury found for the defendants-appellees because they had a subject of good defense in that their conduct was subjectively reasonable and that when viewed objectively, that belief was a reasonable one. It is therefore submitted that the general verdict removes the question which plaintiff-appellant is trying to raise from this case.

CONCLUSION

For the foregoing reasons, the charge to the jury by the court below was correct and the judgment should be affirmed.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 1974, I served the foregoing Brief of the Defendants-Appellees, Andrew Consiglio and Curtis Willoughby, upon counsel for the Plaintiff-Appellant, causing copies to be mailed, postage prepaid, to:

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